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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. ~~1413~~ 1623

WILLIAM H. WELDON, NEWS TRIBUNE COMPANY and JEFFERSON TELEVISION COMPANY,
Petitioners,
vs.
HON. SAMUEL E. SEMPLE, Judge Pro Hac Vice of the Circuit Court of Audrain County, Missouri,
Respondent.

WILLIAM H. WELDON, NEWS TRIBUNE COMPANY and JEFFERSON TELEVISION COMPANY,
Petitioners,
vs.
HON. FRANK W. HAYES, Judge of the Circuit Court of Cooper County, Missouri,
Respondent.

JOINT PETITION UNDER RULE 23 (J) 5 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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JOINT PETITION UNDER RULE 23 (J) 5 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

William H. Weldon, News Tribune Company, and Jefferson Television Company, petitioners, pray that a Writ of Certiorari issue to review the order of the Supreme Court of Missouri entered on May 9, 1966.

OPINION BELOW.

No opinion below.

JURISDICTION.

Jurisdiction is predicated on 28 U. S. C. 1257 (3).

Identical motions supported by affidavit of counsel to stay further proceedings with respect to the plaintiffs' identical actions for $200,000 punitive damages for the publication of a newspaper editorial for the publication of which, in a previous trial (Lupkey v. Petitioners), punitive damages had been assessed against the same defendants, were duly filed in the courts of the respondent judges Semple and Hayes, and were denied on March 23, 1966, and April 16, 1966, respectively (Riner, T. 44, Skain, T. 44-45).

Petitioners' petitions for prohibition and suggestions in support thereof against Judge Semple's trying the case of Riner against petitioners and against Judge Hayes' trying the case of Skain against petitioners were filed in the Supreme Court of Missouri on April 19, 1966 (Riner, T. 1, Skain, T. 1).

The petitions, given docket numbers 52163 and 52164, were denied May 9, 1966 (Riner, T. 62, Skain, T. 63).

Motions for stays of these orders and for stop orders directed to the respondent judges were denied May 11, 1966 (Riner, T. 64, Skain, T. 65).

On May 17, 1966, the Supreme Court of the United States denied petitioners' application for a stay pending the preparation of this petition.

On May 19, 1966, Judge Semple, for reasons unconnected with petitioners' motion, vacated the setting of the Riner case for that date and passed it for further

setting (Exh. A). The Skain case remains set for trial June 23, 1966 (Skain, T. 48).

No order has as yet been entered in plaintiff's appeal of the Lupkey case (in which a verdict for $50,000 punitive damages had been set aside by the trial judge) since the argument and submission in the Supreme Court of Missouri on May 3, 1966 (Exh. B).

The refusal to issue its writ of prohibition is a final judgment of the Supreme Court of Missouri in that action, and this refusal is not subject to further motion. Rule 83.22, Mo. R. C. P.

QUESTION PRESENTED.

Does Amendment XIV, Const. U. S., prohibit putting a publisher twice and three times in jeopardy, for a single publication of an editorial opposing the adoption of proposed municipal legislation, where the form of the State procedure is for "punitive damages", and the substance of the procedure is for judgments in amounts two hundred times the statutory maximum penalty for the defined offense,[1] required by state law to be prayed for,[2] and to be found by the jury,[3] apart from and additional to plaintiff's real damages, to be assessed in different amounts against different joint defendants "depending on differing degrees of culpability"[4] as "a true penalty"[5] "inflicted by way of punishment"[6] "for the public good"[4]?

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[1] §§ 559.410, 556.270, Mo. R. S. 1959; Missouri Approved Instructions 23.06 and comment.

[2] Rule 55.21, Mo. R. C. P.

[3] Rule 71.06, Mo. R. C. P.

[4] State ex rel. Hall v. Cook, 400 S. W. 2d 39, 41.

[5] Sunset Acres Motel, Inc. v. Jacobs, 336 S. W. 2d 473, Mo.

[6] State ex rel. St. Joseph Belt Ry. Co. v. Skain, 341 Mo. 733, 108 S. W. 2d 356.

LAWS INVOLVED.

Amendment V of the Constitution of the United States provides in part as follows:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Amendment I of the Constitution of the United States provides in part as follows:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Section 1 of Amendment XIV of the Constitution of the United States provides in part as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Petitioners are defendants in four actions brought against them for libel in the publication of a certain article published Sunday, September 20, 1964, in the Jefferson City Sunday News & Tribune, a publication of petitioner News Tribune Company, which actions are as follows:

1. Dean Lupkey v. Relators, No. 22426 of the Circuit Court of Cole County, Missouri, in which a judgment was rendered in favor of the plaintiff and against the defendants in the amount of $1,000 on account of actual damages and $50,000 on account of punitive damages. The Circuit Court of Cole County sustained a motion for a new trial and the plaintiff has appealed from the order granting the new trial to the Supreme Court of Missouri, where the action is pending, bearing Supreme Court No. 51811.

2. John W. Riner v. Relators, No. 10555 of the Circuit Court of Audrain County, Missouri, for actual damages and "punitive damages" $200,000; awaiting setting for trial.

3. Montie Willcoxson v. Relators, No. 4674 of the Circuit Court of Moniteau County, Missouri, for actual damages and "punitive damages" $200,000; awaiting setting for trial.

4. Richard B. Skain v. Relators, No. 19076 of the Circuit Court of Cooper County, Missouri, for actual damages and "punitive damages" $200,000; set for trial June 23, 1966.

In each of these cases the identical publication is alleged to be the event on account of which punitive damages are sought, and in each of the latter three cases, Riner, Willcoxson and Skain, punitive damages on account of said publication are prayed for in the sum of $200,000.

Petitioners filed identical motions to stay further proceedings in these latter three cases (Riner, T. 42, Skain, T. 43, Exh. C), which motions read, in part:

> "Defendants state that if the judgment upon the verdict in the Lupkey case be reinstated on the appeal to the Supreme Court, then to proceed in this action for the assessment of additional punishment against them for the same publication of the same editorial would place them in double jeopardy and deprive them of due process of law in violation of Article I, Sections 19 and 10, Constitution of Missouri, and of Article XIV, Section 1, and Article V (made applicable to the States by Article XIV) of the Amendments to the United States Constitution."

On March 23, 1966, the Circuit Court of Audrain County overruled Petitioners' Motion to Stay Further Proceedings in the Riner case, and set the cause for trial May 19, 1966 (Riner, T. 44). The case has subsequently been continued for resetting.

Similarly, in Skain, the Circuit Court of Cooper County overruled Petitioners' Motion on April 16, 1966, and the case remains set for trial on June 23, 1966 (Skain, T. 48).

Petitioners' Motion in the Willcoxson case has not been ruled upon as yet.

On April 19, 1966, petitioners filed Petitions for Writ of Prohibition and Suggestions in Support, in the Supreme Court of Missouri, seeking to prohibit further proceedings in the Riner and Skain cases, certified copies of which accompany this petition as part of the transcript.

The Writs and Suggestions again relied on Amendment V, United States Constitution, and additionally on the First Amendment (both as made applicable to the States by Amendment XIV), as follows:

"If the judgment be reinstated by the Supreme Court of Missouri, to try these relators for the same offense, in the case pending before respondent, and in the other two cases for the imposition of additional punishment on account of the same crime, would be in violation of Article I, Section 10, Constitution of Missouri, of the common law rules against double jeopardy described as autrefois convict, and of that portion of Amendment V to the Constitution of the United States reading '. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, and of that portion of Amendment I to the Constitution of the United States providing 'Congress shall make no law . . . abridging the freedom of speech or of the press . . .'; which provisions are made applicable to the States by Section I, Amendment XIV, to the Constitution of the United States."

Petitioners' Writs of Prohibition were denied by the Missouri Supreme Court on May 9, 1966 (Riner, T. 62, Skain, T. 63), and their Applications to Stay were denied on May 11, 1966 (Riner, T. 64; Skain, T. 65).

ARGUMENT.

While no second and third judgments have been rendered against the petitioners in the cases sought to be prohibited, there is no doubt that they will be placed in jeopardy if certiorari be not granted.

The Skain case is set for trial on June 23, 1966, before Judge Hayes. The Riner case was set for trial on May 19, 1966, before Judge Semple, and for extraneous reasons was passed for a new setting probably in September.

Under Missouri procedure, the fact that the first judgment (of $50,000 punitive damages in the Lupkey case) is still under submission in the Supreme Court of Missouri does not prevent a plea of double jeopardy in an appropriate case, for the Missouri courts hold under such circumstances that the second trial should be stayed pending the outcome of the appeal on the first trial. State v. Bockman, 124 S. W. 2d 1205, 1206. This was the very remedy sought by your petitioners in the motions denied by the trial court which gave rise to the prohibition actions.

In Mills v. Alabama, May 24, 1966, 34 L. W. 4418, this court held that where the statute under which a petitioner was to be prosecuted was clearly unconstitutional, the fact that an actual conviction had not yet occurred did not deprive this court of jurisdiction.

There was a dissent on this portion of the holding. But the Mills case did not involve double jeopardy and the Federal constitutional rule is that this guaranty does not require that the court make its relief wait for judgment, because:

> "It is axiomatic that the prohibition of the Double Jeopardy clause is 'not against being twice punished,

but against being twice put in jeopardy.' Downum v. United States, 372 U. S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100 (1963); United States v. Ball, 163 U. S. 662, 669, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)." United States v. Mirra, 220 F. Supp. 361, 363. See also Kepner v. U. S., 105 U. S. 100, 24 S. Ct. 797, 804.

Assuming the correctness of our argument on the merits, if this writ is denied, petitioners will be deprived of their rights as citizens of the United States, not when, as, and if a second judgment for punishment is inflicted [sic] upon them, but when the trial of these cases, or either of them, is commenced; they having once before been tried for the same offense.

The Missouri constitutional provision on double jeopardy appears in Article I, Section 19, and by its terms it would seem to protect only the common law defense of *autrefois acquit* and not also the common law defense of *autrefois convict*. However, Missouri courts have held that the common law rules against double jeopardy are in force in Missouri. Ex Parte Dixon, 52 S. W. 2d 181, 330 Mo. 652; State v. Snyder, 12 S. W. 369, 98 Mo. 555. And the Missouri courts also hold that the double jeopardy provision of the United States Constitution in Amendment V is declaratory of the common law. State ex rel. Orr v. Kearns, 264 S. W. 775, 304 Mo. 685.

The Federal Constitutional provision is:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

That this provision is applicable to any sort of penalty, notwithstanding the use of the word "life or limb", was finally established by the Supreme Court of the United States in 1874 in the case of Ex Parte Lange, 18 Wall.

163, 85 U. S. 163, 21 L. Ed. 872. After considerable discussion as to the origin and history of this provision, the court held (l. c. 878):

> "If we reflect that, at the time this maxim came into existence, almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence."

Thus, in Clawans v. Rives, 104 F. 2d 240, the provision was held applicable to a sentence "to pay a fine of $5.00 or serve five days in jail."

The petition in each of the three present cases not only identifies, but sets out very nearly completely, the editorial for the publication of which defendants are to be punished by additional judgments of $200,000. There is no doubt that in the Lupkey case the act for which the defendants were punished by a verdict and judgment now under review for $50,000 was the very same publication of the very same editorial.

The applicable law in Missouri is stated in State v. Toombs, 34 S. W. 2d 61, 326 Mo. 981, in which the court, after reviewing the authorities, stated the rule with approval as follows:

> "If there was one act, one intent and one volition, and the defendant has been tried on a charge based on such act, intent and volition, no subsequent charge can be based thereon. . . ."

The court also approved the statement in 16 C. J., Section 445, as follows:

> "A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was submissible under the former, was related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former acquittal or conviction is a part."

Under these rules, there no doubt do arise cases which are close on the question of whether the two offenses alleged are so nearly one as to preclude a second trial. There can be no such a question in the case at bar since the same publication of the same editorial is the basis of all four claims for the punishment of defendants.

The question of whether the double jeopardy clause of Amendment V is automatically and for all purposes incorporated in the prohibitions imposed upon the States by the due process clause of Amendment XIV had not yet been expressly decided by this Court. There has been a division among the members of the Supreme Court in recent years as to whether the due process clause of Amendment XIV automatically incorporates all of the constitutional freedom of the Bill of Rights (the so-called "incorporation doctrine"—Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903), or whether the so-called "absorption doctrine", expressed in Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, is still the law. The "absorption" view would require the examination of particular constitutional guarantees in the Federal Bill of Rights against the circumstances of the individual case and to require their application by the States if the Fed-

eral constitutional guarantees involved "have been found to be implicit in the concept of ordered liberty and thus through the Fourteenth Amendment became valid as against the States". There is no doubt that the rush of current Supreme Court opinions has brought the absorption theory to the point where it is very nearly as all-inclusive as the incorporation doctrine.

A good illustration is in the case of Pointer v. State of Texas, 180 U. S. 400, 85 S. Ct. 1065, and, particularly, in the recent history of Supreme Court opinions in this field reviewed in the concurring opinions of Justice Harlan and Justice Goldberg in that case. Justice Goldberg points out (l. c. 1072):

> ". . . Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of the First Amendment, the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment, the Fifth Amendment's privilege against self-incrimination, the Eighth Amendment's prohibition of cruel and unusual punishments, and the Sixth Amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution." [Footnotes]

This court has not yet had before it specifically the question of whether the double jeopardy clause of Amendment V, under all circumstances, is binding upon the States because of Amendment XIV.

The early leading discussion of this clause in this context appears in Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, a 1937 decision. In that case, Palko was tried for first-degree murder and convicted of second-degree murder and sentenced to life imprisonment. Under an unusual statute, the State appealed and the judgment was remanded for error in the trial. On the second trial, Palko was convicted of murder in the first degree and

sentenced to death. The Supreme Court held that the type of double jeopardy involved in that proceeding,—"if double jeopardy it must be called",—was not prohibited to the States under the absorption of the Fifth Amendment by the Fourteenth Amendment. In this holding, however, the court expressly declared that it did not pass upon the question of whether due process would prohibit a second trial by a State after a first trial which was free of error. At l. c. 153, the court held:

> ". . . . Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? Hebert v. Louisiana, supra. The answer surely must be 'no'. What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error."

Bartkus v. Illinois, 350 U. S. 121, 79 S. Ct. 676, involved the question of whether a second trial by the State of Illinois was barred by a previous trial in the United States Court, which resulted in an acquittal, where the first trial was based upon a violation of the Federal Statute and the second trial based upon a violation of the State statute involving the same conduct by the defendant. The court held that neither the Fifth Amendment of the United States Constitution nor the Fourteenth Amendment of the United States Constitution prohibited trial by separate

sovereigns for crimes defined in separate statutes within their jurisdiction even though the same actions were involved in each. This was a converse application of the well-established law that the prosecution by the Federal Government was not prohibited under the double jeopardy clause by the previous trial for violation of a State statute involving the same actions. The court, through the opinion of Justice Frankfurter, followed the reasoning of Justice Cardozo in the Palko case.

The Bartkus case was decided in 1959. There is no doubt that in recent years and months the continuing tendency of the Supreme Court opinions has been further to extend the control over State law of the requirements of the Federal bill of rights. See, for example, the concurring opinion of Mr. Justice Harlan in Ker v. California, 374 U. S. 23, at 45, 83 S. Ct. 1623, at 1646, deploring "this further extension of Federal power over State criminal cases", etc. It is next to impossible to read the opinion in the case of Pointer v. Texas, supra, without concluding that double jeopardy, in the sense of the Federal phrase in Amendment V, must today be held directly applicable to State procedures.

This is the holding of the Second Circuit Court of Appeals in United States of America v. Hetenyi, 348 F. 2d 844 (July, 1965). At page 854 that court held:

> ". . . Although Palko, if its authority is presumed to be unimpaired, perhaps means that not all of the double jeopardy guarantee of the Fifth Amendment would be 'absorbed' under the doctrine of selective incorporation, it does not mean that no part of the guarantee would be 'absorbed' or that the basic core of the guarantee would not be 'absorbed'."

Accordingly, the Court held (l. c. 864):

> ". . . Yet we believe that Hetenyi is being held in custody in violation of the Due Process Clause of

> the Fourteenth Amendment to the Constitution because . . . the State was constitutionally forbidden to prosecute him for first degree murder following the completion of the first trial [in which he was convicted of second-degree murder only]."

The holding of the Hetenyi case that the federal constitution's double jeopardly clause is binding on the states has just been expressly approved by the New York Court of Appeals in People v. Ressler, April 6, 1966, 34 L. W. 2548.

Whether one considers the Federal double jeopardy provision as binding upon the States under all circumstances, under the incorporation philosophy, or merely binding upon the States only where the right it represents is "implicit in the concept of ordered liberty," under the absorption theory, it is plain that the imposition of multiple punishments for the same wrong by the same jurisdiction would be prohibited by due process of law under the Federal rule as well as under the State rule. If we forget for the moment the dubious distinction between a civil penalty and a criminal penalty, there will surely be no dissent from the proposition that if the $50,000 punitive damage judgment rendered in the Lupkey case had been rendered in what has commonly been denominated a criminal trial; and if the $200,000 penalty sought in the Skain, Riner and Willcoxson cases were likewise in what is called a criminal case, there would be no doubt in anyone's mind that the defense of double jeopardy would be sustained both under the State and Federal provisions. There remains only to consider whether the fact that the punishment is sought to be imposed in a "civil" proceeding, so denominated, can change the effect of the constitutional provision. This court has said "No!".

In New York Times v. Sullivan, 376 U. S. 254, 277, 84 S. Ct. 710, 724, it was explicitly declared:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

If we grant, as we must, that Weldon could not twice be punished in a second criminal prosecution for the same publication of the same article, it must, therefore, follow that he cannot be twice punished in successive civil actions for the same publication.

It is incontrovertible that the punitive damages sought are an attempt to inflict a punishment.

The prayer in each of the petitions below reads (Riner, T. 30, 35, 40, Skain, T. 31, 36, 41):

> "Wherefore, plaintiff prays judgment against defendants in the sum of Fifty Thousand Dollars ($50,000) actual damages together with the sum of Two Hundred Thousand Dollars ($200,000) as punitive damages and his costs herein incurred."

Since recompense for actual damages is set at $50,000, it necessarily follows that the additional $200,000 prayed for must be, as it is expressly alleged to be, punitive in nature.

That such damages are "a true penalty" "inflicted by way of punishment" is not to be doubted under Missouri law. In Sunset Acres Motel, Inc. v. Jacobs, 336 S. W. 2d 473, the court held:

> "The loss of a commission paid by plaintiff is not a true penalty such as is comprehended within the scope of punitive damages. These are 'inflicted by way of punishment for the doing of an act maliciously . . .' (State ex rel. St. Joseph Belt Ry. Co. v. Skain, supra [341 Mo. 733, 108 S. W. 2d 356])".

and on March 14th of this year the Supreme Court of Missouri, in State ex rel. Hall v. Cook, 400 S. W. 2d 39,

held for the first time in Missouri jurisprudence that while the amount of *actual damages* recovered by the plaintiff against multiple defendants must be rendered jointly against them all, the jury might find *different amounts of punitive damages* against the defendants jointly charged with the publication "depending on different degrees of culpability and other circumstances as shown by the evidence", thus abandoning for these punitive damages any conceivable relationship to the plaintiff's injury. 400 S. W. 2d 41, 42.

The court held:

> "It is also our view that our contribution statute, Section 537.060, R. S. Mo., V. A. M. S., does not apply to punitive damages" (l. c. 42).

This section provides:

> "Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution . . ."

The only conceivable reason why this provision is not applicable by its terms to punitive damages has to be that the court does not consider an action for punitive damages to be "an action for the redress of a private wrong". That this is the real import of the court's holding is apparent from the quotation of the court from an opinion of the Supreme Court of South Carolina with approval of the phrase "for the public good" in describing the purpose of a verdict for punitive or exemplary damages (l. c. 41).

Unlike the constitutional guarantees secured by Amendment VI to the Constitution of the United States, the jeopardy provision of Article V does not limit its operation to so-called "criminal" prosecutions. It merely states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." And the fact

that a particular proceeding putting him in jeopardy is designated on the court's docket "civil" cannot serve to defeat the plain effect of the constitutional provision or of the principle which it reflects.

Missouri has adopted a system of obligatory jury instructions, and the instruction approved for civil libel suits for damages expressly uses the statutory definition of libel contained in the definition of the crime of libel. Missouri Approved Instructions 23.06, to which the comment of the Committee is "libel is defined in Section 559.410, R. S. Mo. 1959, V. A. M. S." Thus the jury in any Missouri libel action must find that the defendants have committed the crime of libel, a misdemeanor for which the monetary punishment is set by statute at not exceeding $1,000. Section 556.270, R. S. Mo.

In the Sullivan case, the Alabama law did not require a separate finding of actual and punitive damages and the verdict in that case, for aught that appears, might have been predicated on actual damages alone, or punitive damages alone, or both. Ibid, l. c. 262, l. c. 716. Also this was the first case tried on the publication. Therefore, although noting that under Alabama law there is no double jeopardy limitation applicable to civil lawsuits, and that there was pending additional libel suits against the Times for the same publication (l. c. 278, l. c. 724, 725), the court did not decide the New York Times case on the issue presented here, of whether an out-and-out punitive award imposed in a civil action bars, under the U. S. Constitution, a second such punishment for the same publication.

But Missouri law, unlike that of Alabama, does not lump together punishment and compensation. And these cases do involve a second, third and fourth prosecution for punitive damages.

Missouri procedure (510.270, Mo. R. S., 71.06 M. R. C. P.) requires:

> "When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict."

Accordingly, in the previous trial, the jury found that the amount of Lupkey's actual damages was $1,000. The award of $50,000 "punitive" damages by the same jury, therefore, had nothing to do with Lupkey or his damages. It was *merely* to punish Weldon and the corporations of which he was an officer.

And "*implicit in the concept of ordered liberty*" is that punishment be meted out *by the sovereign.* "Vengeance is mine, I will repay, saith the Lord." Romans XII, 19. The Hatfields and the Coys must in an ordered society look to their peace officers and not to their squirrel guns for retribution. Letters of Marque and Reprisal are denied to the States under U. S. Const., Art. 1, Sec. 10, and stand today condemned and disavowed as a power even of the United States by treaty and by statute. 93 C. J. S. 65.

The idea expressed in the 1964 New York Times case of not permitting in a civil proceeding what is prohibited in a criminal proceeding is only the expression of a purpose that euphemistic paradoxes like "punitive damages" shall not obscure fundamental truths, and this is not a new idea in this field of law. Although it happened that many, though having ears, heard not (Mark VIII, 18), the Supreme Court of New Hampshire said it clearly almost a hundred years ago.

In Fay v. Parker, 53 N. H. 342 (1872), the court held:

> "A synonym of *damage* (when applied to a person sustaining an injury) is *loss.* Loss is the generic term. Damage is a species of loss. Loss signifies the act

of losing, or the thing lost. Damage—in French, *dommage*; Latin, *damnum*, from *demo*, to take away, —signifies the thing taken away,—the lost thing, which a party is entitled to have restored to him so that he may be made *whole* again.

"Damage, we remarked, is derived from *demo*, to take away; and therefore it is not derived from *punio*, to punish.

"When used to signify the money which a plaintiff out to recover, damage is never, nor in any sense, synonymous with nor collateral to the terms example, fine, penalty, punishment, revenge, discipline, or chastisement.

"Loss or damage sustained—the thing taken away —may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage.

"It is just as easy to call things by their right names as by wrong names, and it is better to be correct than careless in our speech.

"The defendant's exception presents the question whether punitive damages (so called, by a perversion of language and ideas so ancient and so common as seldom to attract attention), that is to say, damages in the nature of, and intended as, a penalty or punishment—and exemplary damages, that is to say (if people will persist in saying it), damages in the nature of, and intended as, an example for the protection of the public against offenses similar to that for which such damages are awarded (inflicted), may be given to the plaintiff in a civil action resulting from an act for which the defendant may be indicted and punished by force of the criminal law.

"In considering this question, we must regard the terms exemplary, vindictive, and punitive or puni-

tory, as meaning the same thing; such being, doubtless, the acceptation of the language of the courts generally in cases where these terms are employed with reference to damages in a civil action.

* * * * * * * *

"Almost innumerable practical difficulties must be encountered, involving absurdities disgraceful to the administration of the science of law, destructive of the established rules of pleading, and in utter contempt of constitutional rights and time-honored principles of justice, in the attempt to evade, conceal, or harmonize the incongruities resulting from an effort to recover damages in a civil action for tort, beyond and distinct from compensation to the fullest extent for all the injury which a plaintiff has sustained.

"Every principle and rule of pleading is violated, to begin with. In the first place, the plaintiff is awarded what he does not ask for in his writ. In the next place, the defendant is forbidden to aver, by any pleadings, that he has once paid, or been absolved from the payment, to the state, of that which the plaintiff has received without asking for it. In the third place, the defendant is not only placed in jeopardy of a double punishment for the same offense, but is punished criminally in a civil suit, upon a declaration neither sworn to nor presented by the grand jury.

"Then, again, as we have seen, the elementary rules of evidence are disregarded or completely demolished. The defendant may be compelled, in the civil suit, to testify against himself, in a case in which, upon his own testimony, he may be punished as a criminal.

"He may have depositions read against him, and thus be deprived of his constitutional right to meet the witnesses face to face.

"He may be convicted of, and punished for, a criminal offense upon the mere balance of evidence, although the jury may entertain a reasonable doubt of his guilt.

"Again, the constitutional right of exemption from punishment, after a pardon by the executive, is violated by the imposition of punitive damages. The pardoning power being a constitutional power (N. H. Const., Art. LII), the exemption of the pardoned criminal is a constitutional exemption. But by the imposition of a fine in a civil action the executive pardon and remission of the fine is ignored.

"Suppose this defendant shall hereafter be indicted for the offense which is the subject of this suit: of what avail will it be that he shall plead a judgment, rendered on this verdict, for exemplary damages?

* * * * * * *

"Now, why all the unnecessary trouble, confusion, and perplexity, when the course of procedure should be plain, straight, and uninterrupted? The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment—namely, the reformation of the offender and the safety of the people. Let the individual, whose rights are infringed and who has suffered injury, go to the civil courts and there obtain full and ample reparation and compensation, but let him not thus obtain the 'fruits' to which he is not entitled, and which belong to others.

"Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? deprives him of

the right of meeting the witnesses against him face to face? deprives him of the right of not being compelled to testify against himself? deprives him of the right of being acquitted, unless the proof of his offense is established beyond all reasonable doubt? deprives him of the right of not being punished twice for the same offense?

"Punitive damages destroy every constitutional safeguard within their reach . . ."

Much the same conclusions were expressed by the Missouri Supreme Court in McKeon v. Citizens Ry. Co., 42 Mo. 79 (1879), in which the court said (l. c. 87, 88):

"In Freinenheit v. Edmondson, 36 Mo. 226, we had occasion to consider what was properly meant by exemplary damages. It was a case of willful injury, and exemplary damages were defined to be merely a round compensation or an adequate recompense for the injury sustained. Such damages may serve as an example to others in like cases, and may so far be called exemplary. The question of punitory damages was not necessarily involved in that case, but a distinct intimation was given that the principle of administering punishment belonged rather to criminal than to civil jurisprudence . . . It is, at least, very questionable, upon principle and authority, whether damages for punishment can be given in any civil action. My own opinion is that they cannot."

If, as common sense, authority and logic demand, constitutional limitations against successive punishments *enforced by the same sovereign for the same conduct constituting a single statutory offense* are paramount to the form of the proceedings in which they are imposed, then certiorari should issue to vindicate both State and Federal constitutional protections against double jeopardy.

CONCLUSION.

Wherefore, petitioners pray for the issuance of a Writ of Certiorari to the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX.

Judgments Sought to Be Reviewed:

In the Supreme Court of Missouri.

State ex rel. Weldon et al. v. Semple, Judge.

No. 52,163.

May 9, 1966

"Relators' petition for writ of prohibition denied."

In the Supreme Court of Missouri.

State ex rel. Weldon et al. v. Hayes, Judge.

No. 52,164.

May 9, 1966

"Relators' petition for writ of prohibition denied."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 231.

WILLIAM H. WELDON, NEWS TRIBUNE COMPANY and JEFFERSON TELEVISION COMPANY,
Petitioners,

vs.

HON. SAMUEL E. SEMPLE, Judge Pro Hac Vice of the Circuit Court of Audrain County, Missouri,
Respondent.

WILLIAM H. WELDON, NEWS TRIBUNE COMPANY and JEFFERSON TELEVISION COMPANY,
Petitioners,

vs.

HON. FRANK W. HAYES, Judge of the Circuit Court of Cooper County, Missouri,
Respondent.

ADDITIONAL STATEMENT TO JOINT PETITION UNDER RULE 23 (J) 5 FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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ADDITIONAL STATEMENT

Subsequent Events.

Both this Court and the Supreme Court of Missouri having refused a stay, one of the two cases involved in these applications, i. e., Skain v. Realtors, was tried on June 23 and 24, 1966, to a jury, which returned a verdict for defendants both as to actual and as to punitive damages (Skain, Supp. T. 1). A motion for new trial is pending (Skain, Supp. T. 2).

This was the trial the punitive damages portion of which relators sought to have prohibited in the second of the two above-captioned Missouri proceedings in prohibition (Weldon v. Hayes, Judge), which are under review in these certiorari applications (Skain T. 1, et seq.). In our Petition, p. 5, it is listed as No. 4 of the cases in which punitive damages are sought for the single publication.

The trials of the cases listed as "2" and "3" (Pet. p. 5) are pending; No. 2, Riner v. Relators, being the subject of the first of the two above-captioned Missouri proceedings in prohibition (Weldon v. Semple, Judge), which are under review in these certiorari applications (Riner T. 1, et seq.).

Unless plaintiff's motion for new trial be granted in the Skain case, therefore, the latter of these two captioned applications (Weldon v. Hayes, Judge) is mooted.

However, as far as the other application is concerned (Weldon v. Semple, Judge), these subsequent events fortify (as we shall argue) the application for certiorari.

ARGUMENT.

On the facts originally presented by these petitions the basis for the plea of double jeopardy was the common law plea of *autrefois convict,* arising out of the verdict of $50,000 *punitive* damages (expressly so found) against these relators for the same publication in the Lupkey case. A motion for new trial was granted and plaintiff's appeal seeking reinstatement of the award is presently under submission in the Supreme Court of Missouri. Because the new trial was granted on relators' motions, it would have been possible to argue, by ignoring the Missouri rule of State v. Bockman (Pet. p. 8), that the plea of double jeopardy is not applicable until and unless the Lupkey verdict is reinstated (U. S. v. Shotwell Mfg. Co., 355 U. S. 233, 78 S. Ct. 245, 252, 2 L. Ed. 2d 234, citing U. S. v. Ball, 163 U. S. 662, 672, 16 S. Ct. 1192, 1195, 41 L. Ed. 300.

On the facts subsequently developed, however, the plea of double jeopardy in the remaining case becomes predicated both on what was the common law plea of *autrefois convict* (in Lupkey v. Weldon) and on that of *autrefois acquit* (in Skain v. Weldon). As to the latter case, it is the plaintiff-prosecutor who will have to urge error and seek a new trial, and if double jeopardy properly applies in a judicial proceeding which has for its purpose the infliction of judgment for moneys assessed purely and expressly for *punishment,* even though (euphemistically) designated *civil* on the court's docket, then error (against the prosecutor) is irrelevant under the plea. Green v. U. S., 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199, 61 A. L. R. 2d 1119.

Thus even though we regard the second named of the two applications (Weldon v. Hayes, Judge) as mooted pending the motion for new trial, the first of these two

applications now presents still more clearly the Question Presented (Pet. p. 3) of whether operation of the constitutional provisions against multiple trials for the same offense can be aborted merely by designating as "civil" several judicial proceedings seeking to punish defendants (relators) for the statutory crime of libel in the publication of a single article.

The question seems to be already answered by the statement of this Court in New York Times v. Sullivan, 376 U. S. 277, 84 S. Ct. 724:

> *"What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."*

The petition should be granted in Weldon v. Semple, Judge.

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